BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 704

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

228739

NOTICE OF INTENT TO PARTICIPATE

and

WRITTEN TESTIMONY

of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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Dated: January 31, 2011

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The National Industrial Transportation League ("League") submits this Notice of Intent to Participate in the Oral Hearing to be held on February 24, 2011 and its Written Testimony to the Surface Transportation Board ("Board" or "STB") in response to the Board's Notice served on October 21, 2010, and as corrected and modified by decisions served October 25, 2010 and November 19, 2010 (collectively, "Notice"). Bruce Carlton, President of the League, will appear at the hearing and requests five minutes of hearing time. Mr. Carlton will present a statement that synthesizes the issues set forth in this testimony. The League also requests that its legal counsel from Thompson Hine LLP be present at the hearing.

In its Notice, the Board seeks written and oral testimony in order to review certain categorical exemptions from regulation under 49 U.S.C. § 10502; specifically the commodity exemptions under 49 C.F.R. §§ 1039.10 and 1039.11, the boxcar exemptions under 49 C.F.R. § 1039.14, and the trailer-on flatcar/container-on-flatcar ("TOFC/COFC") exemptions under 49 C.F.R. pt. 1090. In its Notice, the Board indicated that it had exempted numerous commodities, services, and types of transactions from regulation.

However, as long as 30 years have passed since the adoption of many of these exemptions. In view of the passage of time and the changes in the competitive landscape and in the railroad industry that have occurred, the Board is holding a hearing to explore the continuing utility of and the issues surrounding these exemptions. Specifically, the Board seeks comments as to: (a) the effectiveness of these exemptions in the marketplace; (b) whether the rationale behind any of these exemptions should be revisited; and, (c) whether the exemptions should be subject to periodic review.

The League submits this Written Testimony in response to the Board's Notice. The League warmly applauds the Board's initiative in this matter. The League believes that major changes have taken place in the rail transportation industry since these exemptions were granted. Many of these changes have undermined the original bases for granting the exemptions and call into question whether the statutory standard for the granting of an exemption is currently being met. Thus, the League strongly believes that the Board should undertake a careful and comprehensive review of the current exemptions listed by the Board in its Notice to determine whether those exemptions are currently justified; or, alternatively, whether they should be revoked or modified. In addition, the League believes that the Board should commit to periodic future reviews.

I. STATEMENT OF INTEREST

The League is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. The League was founded in 1907, and currently has over 600 company members. These company members range from some of the largest users of the nation's and the world's transportation systems, to smaller companies engaged in the shipment and receipt of goods. The majority of the League's members include shippers and receivers of goods; however, third party intermediaries, logistics companies, and other entities engaged in the transportation of goods are also members of the League. Many members of the League are engaged in transportation of goods via rail and many members of the League transport commodities via rail subject to the exemptions listed by the Board in its Notice.

II. BACKGROUND TO THE AGENCY'S GRANT OF ITS EXEMPTIONS

Until the mid-1970's, the Board's predecessor the Interstate Commerce Commission ("ICC") administered a pervasive scheme of railroad rate regulation, characterized by the required publication and filing of tariffs, a complex and rigid relationship among freight rates and significant restrictions on the cancellation of certain rates; and a broad opportunity to challenge filed rates. *Exemption From Regulation – Boxcar Traffic*, 367 I.C.C. 425 426 (1983) ["*Boxcar Exemption*"]. Over forty Class I railroads existed. The economic condition of the rail industry was poor, causing the Congress to find that earnings by the railroad industry were the lowest of any transportation mode and were insufficient to generate funds for needed capital improvements, estimated at between $16 billion and $20 billion. See, Sec. 2 of Pub. L. 96-448, 94 Stat. 1896 (1980). Prior to 1980, the agency could exempt a matter related to a rail carrier only if it found that the application of a provision of the law was not necessary to carry out the transportation policy; the statutory provision would be an "unreasonable burden" on a person or persons or interstate or foreign commerce; and application of the statute would "serve little or no public purpose." See, 49 U.S.C.A § 10505(a) (1978).

The Staggers Rail Act of 1980 ("SRA") made major changes to this structure. Contracts were permitted, but they had to be filed with the agency along with a summary of the contract's provisions. The agency's jurisdiction was limited to common carrier rates exceeding 180 percent of the variable cost of the movement. The SRA precluded the agency from finding that rates were unreasonably low in virtually all circumstances; and it permitted the cancellation of certain joint rates without the concurrence of the connecting carrier. Most important for this proceeding, the SRA narrowed the findings required by the agency in order to exempt a person or transaction from regulation, requiring only that the agency find that continued regulation was "not necessary" to carry out the transportation policy; and either that the transaction was of "limited scope" or that the application of the act was "not needed to protect shippers from the abuse of market power." SRA, § 213, amending 49 U.S.C. § 10505. Moreover, the Conference Committee's Report on the SRA placed an affirmative duty on the agency to "pursue partial or complete exemptions from regulation . . . " H.R. Rept. No. 96-1430, 96th Cong., 2d Sess., 105 (1980), as reprinted in U.S.C.C.A.N. 4110; *Boxcar Exemption,* 367 I.C.C. at 428.

Under the authority of these new statutory provisions and policy changes, between 1981 and approximately 1993, the agency proceeded to exempt numerous commodities, services, and types of transactions from regulation, as summarized in the Board's Notice. In granting these exemptions, the agency frequently relied on similar evidence in making findings in order to meet the statutory requirements for an exemption.

In considering the first prong of the requirements for an exemption, that application of the statute is "not necessary" to carry out the transportation policy, the agency frequently found that grant of an exemption would promote various provisions of the transportation policy, by encouraging more efficient pricing and allowing carriers to earn adequate revenues by "removing procedural regulatory burdens and allowing rail management to respond flexibly to market conditions." See, *e.g.*, *Boxcar Exemption;* 367 I.C.C. at 446. The agency also typically found that the grant of the exemption would result in "substantial cost savings for the railroads, thereby increasing their efficiency . . ." This finding was based on the fact that exempt commodities did not require tariff or contract filing. See, *e.g., Rail Exemption – Miscellaneous Manufactured Commodities*, 6 I.C.C.2d 186, 191 (1989) [*Misc. Manuf'd Commodity Exemption*]. In the same vein, the agency often found that then-current regulation "inhibits the railroads from competing with other modes," because of the costs and delays inherent in tariff and contract filing. *Rail Exemption – Lumber or Wood Products,* 7 I.C.C.2d 673, 677 (1991) [*"Lumber/Wood Exemption"*]; see also, *Misc. Manuf'd Commodity Exemption,* 6 I.C.C.2d at 188, 190 (the exemption would "promote efficiency and improve the railroads' financial health by eliminating costly tariff filing requirements" and result in "substantial cost savings").

In addition to cost reductions, the agency also cited to the reductions in "overhead expenses" and in "administrative and paperwork burdens." *Lumber/Wood Exemption,* 7 I.C.C.2d at 675. The agency also frequently found that the exemption would "significantly further several of these Congressional policy objectives" because the exemption would reduce delays in railroad competitive pricing responses. *Id.* The agency cited to evidence that the then-existing regulations "impede [shippers'] ability to gain access to the quick phone-rate quotes necessary for them to compete effectively in their own product markets," and that the exemption might "help solve problems with delays on some individual single-line or joint rate changes." *Id.* at 678; *see also, Boxcar Exemption,* 367 I.C.C. at 429 (exemption would give Conrail freedom to negotiate satisfactory divisions). This finding was based on the fact that exempt commodities were not subject to the then-current rule that rate reductions required certain statutory notice and the cancellation of certain joint rates was cumbersome.

A good summary of this entire line of findings under the "not necessary to carry out the transportation policy" requirement for an exemption was set forth in one of the ICC's last major exemption decisions, when the agency declared that

> Regulation is not necessary to carry out the transportation policy of 49 U.S.C. § 10101a. . . . An exemption would: "minimize the need for federal regulatory control" [10101a(2)]; promote "adequate revenues" by allowing carriers to use spot rate reductions to attract low-cost, backhaul traffic [10101a(3)]; increase competition between rail carriers and trucks by allowing quick, selective rate changes in response to competition [10101a(5)]; allow more efficient management by (i) allowing pricing changes in response to changing business conditions, and (ii) allowing carriers to reduce costs associated with contract rate establishment and management [10101a(10)] . . .

Rail Exemption – Petition of AAR to Exempt Rail Transportation of Selected Commodity Groups, 9 I.C.C.2d 969, 973 (1993) [*AAR Selected Commodity Exemption"*].

Under the Staggers Act, the agency was also required to find that an exemption would not result in an "abuse of market power" by rail carriers. In meeting this requirement, the agency typically made findings that strong intermodal competition existed, especially from trucks. *See, e.g., Boxcar Exemption,* 367 I.C.C. at 433, 434; *Misc. Manuf'd Commodity Exemption,* 6 I.C.C.2d at 189, 191-193; *Lumber/Wood Exemption,* 7 I.C.C.2d at 677. It also found that competition from numerous other rail carriers restrained rates. See, *e.g., Boxcar Exemption,* 367 I.C.C. at 433; *Lumber/Wood Exemption,* 7 I.C.C.2d at 677. And, it also found that there was substantial product and geographic competition that would prevent rate abuse. See, *e.g., Boxcar Exemption,* 367 I.C.C. at 434.

III. MAJOR CHANGES HAVE TAKEN PLACE IN THE RAIL TRANSPORTATION INDUSTRY SINCE THESE EXEMPTIONS WERE GRANTED, CLEARLY UNDERMINING THE BASES FOR THE ORIGINAL GRANT OF THE EXEMPTIONS

Between the period when the ICC granted the exemptions that are now the subject of this proceeding (approximately 1981-1993) and the current day, major changes have taken place both in the statutory scheme and in the rail marketplace.

On the statutory side, in 1995 Congress passed the Interstate Commerce Commission Termination Act ("ICCTA").[1] In addition to replacing the ICC with the Board, ICCTA also completely eliminated a number of regulatory requirements that the Board had relied on to support the grant of its exemptions, including the exemptions at issue in this proceeding. Thus, as a legal matter, the Board's frequent conclusion that the elimination of these unnecessary regulatory requirements through the grant of an exemption, along with their concomitant cost savings and efficiency gains, would advance the national transportation policy, no longer holds true. The Board cannot justify the continuation of an exemption for *some* commodities on the basis of benefits that the Congress has decided should be applied to *all* commodities. For this reason alone, the Board should initiate a review of these exemptions to determine if the statutory standard is still being met.

In addition, these major statutory changes have been matched by equally dramatic changes in the rail marketplace. The rail industry, once almost financially prostrate, is now extremely strong financially. Rail-to-rail competition has shrunk substantially with the loss of many rail competitors through mergers. This, in turn, has drastically reduced geographic competition. The trucking industry is also currently beset with numerous challenges that hamper its ability to be an effective competitor in many markets, especially long-haul markets. These changes are so pervasive that the Board should undertake a formal inquiry to determine if the agency's broad grants of exemptions should now be reversed or at least narrowed to conform to current circumstances.

[1] P.L. No. 104-88, 109 Stat. 803 (Dec. 29, 1995).

A. Statutory Changes Made Since the Passage of the Staggers Act Have Undermined the ICC's Exemption Decisions

1. Tariff Requirements, Suspension of Rates, and Joint Rate Regulation Prior To and After the Staggers Act

Even though the Staggers Act reduced regulatory requirements for the nation's railroads, a number of regulatory requirements still existed. Prior to the Staggers Act, rail carriers service could only be provided if the rate was contained in a tariff that was "publish[ed]" and file[d]" with the Interstate Commerce Commission. Those tariff filing requirements were unchanged by the Staggers Act. Compare, 49 U.S.C. §§ 10761 and 10762 (1978); with 49 U.S.C. §§ 10761 and 10762 (1981). Thus, under the Staggers Act, carriers were not relieved of the burden and cost of publishing and filing tariffs.

In addition, under the Staggers Act, contracts were statutorily permitted for the first time, 48 U.S.C. § 10713 (1981), but each contract entered into was required to "be filed with the Commission, together with a summary of the contract containing such nonconfidential information as the Commission prescribes." 49 U.S.C. 10713(b)(1). Thus, under the Staggers Act, there were substantial paperwork burdens and costs associated with the hugely-popular development of rail transportation contracts.

Prior to the Staggers Act, a rail carrier could file a new or reduced rate only by providing a notice of the new or reduced rate, and could not make the new or reduced rate effective on less than 30-days' notice. 49 U.S.C. § 10762(c)(2) and (3) (1978). After the Staggers Act, the time periods for notice and delay in the effective date were lessened for new and reduced rates to 20 days (for new rates) and 10 days (for decreased rates), but notice and some delay were still required. Compare, 49 U.S.C. § 10762(c)(2) and (3) (1981). Thus, even under the Staggers Act, carriers could not immediately respond to their competitors' rate actions.

Moreover, rail carriers were still subject to regulatory action and suspension of rates prior to providing service. Prior to the Staggers Act, the ICC could suspend rail carriers' rates for up to seven months if a proposed rate change would cause "substantial injury" and it was "likely that the complainant will prevail on the merits." After the Staggers Act, the agency could still suspend rates, though the time period for suspension was shorter and the burden of proof on the complaining shipper was higher. *Compare,* 49 U.S.C. 10707(a) and (b) and (c)(1) (1978) with 49 U.S.C. 10707(a) and (b) and (c)(1) (1981). Thus, even after the Staggers Act, rail carriers were still subject to certain regulatory interference at the initiation of the ratemaking process.

Finally, although the Staggers Act loosened the requirements for the establishment and cancellation of joint rates compared to the prior law, by providing a new means of imposing surcharges on joint rates and cancellation of certain joint rates, 49 U.S.C. 10705a (1981), the procedure was extremely complicated and cumbersome.

In summary, even after the Staggers Act, rail carriers were still subject to burdensome tariff and contract filing requirements. Competitive rate responses to actions by motor carriers were still subject to regulatory delays. Cancelling and surcharging joint rates, though easier than before, was a procedure hemmed in by substantial regulation, and rail carriers were still subject to suspension of their rates by the ICC.

2. <u>Changes to Tariff Requirements, Suspension of Rates, and Joint Rate Regulation After the ICC Termination Act</u>

Although ICCTA is sometimes thought of as having done little more than transfer the responsibilities of the ICC to a new agency, ICCTA did substantially more than that. ICCTA made major changes in the STB's authority and reduced or eliminated a number of the remaining regulatory requirements on rail carriers. ICCTA had particularly significant effects on *precisely* the areas relied on by the former ICC to justify many of the exemptions granted between 1981 and 1993.

In particular, ICCTA removed the burdensome requirement for rail carriers to publish and file tariffs with the agency. In the place of the tariff filing requirement, rail carriers were only required to provide in writing "on request, the carrier's rates and other service terms." 49 U.S.C. § 11101(b) (1996). In addition, the filing of contracts was completely eliminated, and the filing of contract summaries was eliminated as well, with the narrow exception of agricultural contracts, where summaries still had to be filed. 49 U.S.C. §10709 and § 10709(d)(1) (1996). Most importantly, carriers could implement rate decreases immediately. See, 49 U.S.C. §11101 (1996) (notice and delay only applies to rate increases). Major changes also were made with respect to the Board's regulatory power: the Board could only act upon complaint, 49 U.S.C. § 10704(b) and the suspension provision was eliminated, replaced by a very vague injunction power that could be exercised only "when necessary to prevent irreparable harm." See, 49 U.S.C. § 721(b) (1996). Finally, the cumbersome procedure for surcharging and cancelling joint rates was also completely eliminated, the remaining requirements for joint rates was substantially streamlined, and carriers were given substantial joint rate flexibility. Compare 49 U.S.C. §§ 10705 and 10705a (1981) with 49 U.S.C. § 10705 (1996) [49 U.S.C. § 10705a is eliminated].

3. Effects of the Changes Made By ICCTA On the Basis of the ICC's Exemption Decisions

After the Staggers Act but before the passage of ICCTA, the grant of an exemption had the effect of eliminating substantial requirements and restrictions on carriers. In the post-SRA-but-pre-ICCTA period, once an exemption was granted, carriers did not have to file either tariffs or contracts; they could immediately respond to competitive rate actions; their freedom to act on joint rate rates was complete; and their rates were not subject at all to suspension and investigation.

All of these were clear benefits of an exemption in this 1981-1993 period. All of these benefits accrued to carriers, and some of these benefits also accrued to shippers. Indeed, in its decisions in this period the Board often noted the fact that certain shippers *supported* the grant of an exemption precisely *because shippers themselves would benefit.* See, *e.g., Lumber/Wood Exemption,* 7 I.C.C.2d at 677 (Georgia Pacific favors exemption because contracts would not be subject to costs and burdens, and Potlatch Corp. favors exemption because exemption would permit rail carriers to respond without delay); *Misc. Manuf'd Commodity Exemption,* 6 I.C.C. at 191 ("this exemption will also result in substantial cost savings for the railroads, thereby increasing their efficiency, especially in the marketing of services. . . . [N]umerous shippers . . . concur.").

After ICCTA, however, the pre-ICCTA benefits of an exemption – no tariff filing, no contract or contract summary filing, no regulatory delay for competitive rate decreases, few regulatory restrictions on joint rate cancellations, etc. – were now extended to <u>all</u> shippers, whether or not exempted from regulation. Thus, with respect to shippers, there are in fact <u>no</u> current benefits to an exemption, since all of the benefits that used to accrue from an exemption have been conferred on all shippers, whether their products or services have been exempted from regulation or not. From the shippers' point of view, the results of an exemption today is the loss of remaining regulatory protections, without any balancing benefits.

More to the point, however, the changes made by ICCTA have substantially undermined the basis for many of the exemption decisions rendered in the 1981-1993 time period. As noted in the discussion above, the Board found in many of its exemption decisions that the first prong of the exemption requirement was met because an exemption would in fact *advance* the national transportation policy by promoting "adequate revenues" by allowing carriers to use spot rate reductions to attract low-cost, backhaul traffic, under 10101a(3); increase competition between rail carriers and trucks by allowing quick, selective rate changes in response to competition, under 10101a(5); and allow more efficient management by allowing pricing changes in response to changing business conditions, and allowing carriers to reduce costs associated with contract rate establishment and management, under 10101a(10). But each of these policies cannot now be advanced by an exemption, because an exemption is *not* necessary to effectuate each and every one of these benefits. Thus, under the statute, regulation is not "necessary to carry out the transportation policy of section 10101 of this title" to justify the grant of an *exemption* from those regulations because the Congress in ICCTA has decided that regulation in these areas should be eliminated *entirely*. See, 49 U.S.C. § 10502(a)(1). Clearly, the agency could not have originally found that such effects of an exemption would have met the "not necessary" requirement if the changes made by ICCTA in 1995 would have been made, for example, in 1981. In short, the Board cannot justify the continuation of an exemption for *some* commodities on the basis of benefits that the Congress has decided should be applied to *all* commodities.

Indeed, even if there were no other changes to the rail industry in the decades since the exemptions at issue in this proceeding were granted, the changes made by ICCTA alone would necessitate a wholesale review of those exemptions.

B. The Rail Industry Is Now Extremely Strong Economically

In dramatic contrast to the Congress' findings over thirty years ago that earnings by the railroad industry were the lowest of any transportation mode and were insufficient to generate funds for needed capital improvements, the rail transportation industry today is extremely strong financially. This is shown both by the Board's own findings, as well as analyses published by numerous other parties.

In 1981, the first year that the agency decided to measure revenue adequacy by a return on investment standard, the ICC found that only three of thirty-five Class I railroads were revenue adequate. *Standards for Railroad Revenue Adequacy*, 364 I.C.C. 803 (1981). By 1994, the last year before the passage of ICCTA, the ICC found that only one of the twelve Class I rail carriers in existence at that time was "revenue adequate."[2]

However, the past several years, before the Great Recession of 2008-2009, have seen a number of railroads achieve revenue adequacy under the Board's standards, and more importantly, the rates of return as calculated by the agency for all railroads have been above or close to the Board's standard. In 2006, for example, three out of the seven Class I carriers were revenue adequate, and the simple average of the rate of returns for all seven Class Is was 10.4%, or above the cost of capital for the rail industry for that year (9.94%). In 2007, two of the seven Class Is were revenue adequate, and the simple average of the rate of returns for all seven Class Is was 10.7%, or ninety-four percent of the ROI standard calculated by the Board (11.33%). Even in 2008, after the beginning of the recession, one carrier was still revenue adequate, and more importantly, the simple average rate of return for all seven Class Is was 10.1%, or still over 86% of the ROI standard calculated by the Board (11.75%).[3]

The railroads' own figures show this strong upward trajectory. According to the AAR,[4] in 1980, the rate of return on net investment of the railroad industry was 4.22%, compared to a regulatory cost of capital of 12.1% -- the rate of return of the industry was only about one-third

[2] See, Ex Parte No. 524, *Railroad Revenue Adequacy – 1994 Determination*, decision served August 18, 1995.
[3] See also, S. Rep. No. 111-380, 111th Cong. 2d Sess., p. 2 ("The average Class I railroad's return on investment increased from 1978 when it was 1.52 percent to 10.7 percent in 2008.").
[4] See figures published in "Railroad Facts," published by the Association of American Railroads, in which the AAR has published the history of these figures each year for many years.

of the level of the regulatory cost of capital determination. By 1995, the industry's rate of return equaled 7.04 percent, compared to a regulatory cost of capital of 11.7%. Thus, the industry's ROI was at that point 60% of the cost of capital determined by the agency. By 2006, however, the industry's rate of return according to the AAR was 10.17 percent, or *above* the cost of capital determination by the STB for that year of 9.94%. By 2008, after the start of the recession, the AAR calculated the railroad industry's return on investment at 10.7%,[5] again very close to the Board's calculation of the industry's cost of capital for that year (11.75%).

Independent analyses confirm the financial health of the industry. A study published just four months ago by the Office of Oversight and Investigations of the Senate Committee on Commerce, Science and Transportation entitled "The Current Financial State of the Class I Railroad Industry," September 15, 2010 ("Senate Financial Report"), concluded that "[a] review of the Class I railroads' recent financial result shows that the Staggers Act's goal of restoring financial stability to the U.S. rail system has been achieved." Senate Financial Report, p. 1. The Senate Report noted that the four largest U.S. rail carriers have nearly doubled their collective profit margin in the last ten years. *Id.*, p. 5. In 2008, the railroad companies' profit margin placed the industry fifth out of 53 industries on *Fortune's* list of "most profitable industries." *Id.* Between 2001 and 2008, the railroad industry was ranked in the top ten on *Fortune's* profitability list seven out of eight times, and its growth in profitability had outpaced almost all other large industries. *Id.* All of this is a far, far cry from the Congress' finding in 1980 that the railroad industry's profitability was the lowest of any transportation mode. The Senate Financial

[5] *Railroad Facts, 2009 Edition,* published by the Association of American Railroads, p. 18.

Report concluded that freight railroads are "now some of the most highly profitable businesses in the U.S. economy." *Id.* at 14.[6]

These findings have been confirmed by Wall Street's judgments. The Senate Financial Report noted the strong investor interest in the freight railroad industry. *Id.* at pp. 5-8. Indeed, in November 2009, the investor Warren Buffett purchased, in a deal valued at approximately $34 billion, the nearly three-quarters of the BNSF railroad that his company did not already own.

Why does the fact of the railroads' financial renaissance and current financial health matter in this proceeding? In examining the ICC's exemption decisions in the 1981-1993 time period, it is clear that one of the bases of the ICC's broad program to grant exemptions during that time was to assist rail carriers to achieve financial health. But as this section makes clear, that purpose has been achieved. Thus, the second foundation of the agency's exemption decisions -- the need to promote adequate revenues for a financially-fragile industry -- has also been undermined. Even if there have been no other changes, the Board needs to re-examine its exemption decisions to determine if the risks to shippers in withdrawing virtually all regulatory protections in order to help the rail industry to achieve financial health now makes sense in light of the fact that the industry is now in fact financially healthy.

C. There Have Been Major Competitive Changes In Transportation Industry Competition to Rail Carriers

As noted in Section II, the agency's exemption decisions from 1981 to 1993 were based on a conclusion that there was strong intermodal, intramodal, and product and geographic competition. Thus, the agency believed, the risk of withdrawing regulatory protections from

[6] A recent update of a study by Christensen Associates concludes that in recent years the revenue of the freight railroad industry has exceeded industry costs, and thus the industry has thus achieved "revenue sufficiency." See, "An Update to the Study of Competition in the U.S. Freight Railroad Industry – Final Report," Laurits R. Christensen Associates, Inc., Madison, Wisconsin, January 2010 ('Updated Christensen Report"), p. 4-13. See also, an Presentation to the Association of Transportation Law Professionals, by Kelly Eakin of Christensen Associates, November 2010, p. 9.

shippers of exempt commodities would be minimal. But there are strong reasons to believe that this also has changed, and that the current situation may be far more complicated than the broad conclusions in the agency's exemption decisions, which were often based on highly-generalized data.

First, it is very clear that rail-to-rail competition is dramatically reduced from the 1981-1993 time period. There were over forty Class I railroads at the time of the Staggers Act. By 1993, when the wave of exemptions essentially ended, there were still a dozen large rail carriers competing against one another. *Railroad Facts, 1994 Edition,*, p. 4. Today, there are only seven Class I rail carriers, and of these seven, just four dominate the industry, with the BNSF, UP, CSXT, and NS accounting for over 90% of Class I freight shipments and over 92% of Class I railroads $61 billion in revenues. Senate Financial Report, p. 3, citing the Association of American Railroads *Railroad Ten-Year Trends, 1999-2008* (Feb. 2010). The dominance of these four carriers is increased by the fact that only two of them serve the eastern and two serve the western portions of the U.S.

This increasing consolidation of the industry has taken its toll on geographic competition, a result that was largely ignored in the agency's merger decisions in the 1990s. Shippers whose U.S. manufacturing facilities that used to be located on several railroads and who could threaten production shifts from one factory to another are now located on just one. The U.S. Department of Transportation and the U.S. Department of Agriculture have noted that the effectiveness of geographic competition has been substantially reduced as a result of mergers. *Study of Rural Transportation Issues,* study by the U.S. Department of Transportation and the U.S. Department of Agriculture, April 2010 ("DOA/DOT Ag Study"), p. 206. Indeed, in 1998, the Board itself decided to ignore these forms of competition in determining market dominance. Ex Parte No.

627, *Market Dominance Determinations – Product and Geographic Competition,* decision served December 10, 1998.

There is increasing evidence that motor carrier competition is more limited in scope and is less robust generally than it was twenty or more years ago. A Congressional Report recently noted that, since 1980, railroads have captured an increasing share of U.S. freight shipments, accounting for about 27 percent of ton-miles of U.S. freight movements in 1980, compared to over 42 percent in 2007. S. Rep. No. 111-380, 111th Cong. 2d Sess., p. 3. The Senate Financial Report quoted one analyst that in 2006, trucks handled 80 percent of the freight hauls between 700 and 1000 miles, while today trucks and railroad split this market.

Rail pricing also suggests less effective competition from other modes. The Updated Christensen Report noted that overall rail rates have been steadily increasing since 2004, with a particularly steep increase in 2008.[7] It also notes that real rail revenue per ton mile increased by 12 percent in just the two-year period between 2007-2008.[8] This trend, which suggests increasing market power relative to other competitors, has been noted by others.[9] For example, the Senate Financial Report, citing figures from a leading industry analyst (Wolfe Research), noted that since 2004, Class I railroads have been raising prices by an average of 5% a year above inflation, and that even during the recent recession, Class I railroads have been able to increase prices year-over-year, while the pricing of other freight modes has languished. Senate Financial Report, pp.8-9; see also, DOA/DOT Ag Study, pp. viii and ix and p. 244. A very recent analysis of certain agricultural commodities indicates that, while in 1988 states with limited rail-to-rail competition and long distances from barge facilities paid the highest rail rates,

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[7] Updated Christensen Report, p. i (Executive Summary).
[8] *Id.*
[9] The AAR's own figures indicate that rates on an inflation-adjusted basis are up since 2004. See, http://www.aar.org/~/media/aar/backgroundpapers/thecosteffectivenessofamericasfreightrailroads.ashx

by 2007 states with more nominal rail-to-rail competition and more competition from barge modes paid higher rail rates than the limited-competition states. See, "Rail Competition Changes Since the Staggers Act," *Journal of the Transportation Research Forum*, Vol. 49 No. 3 (Fall, 2010), by Prater, et. al, at 127. This suggests that alternative forms of competition are becoming increasingly weak.

Industry analysts have noted the increasing pricing power of the rail industry. Recently, Wolfe/Trahan reported that "rail pricing continues to accelerate," with increases even in a traditionally motor-carrier-competitive commodity segment such as intermodal.[10] The Senate Financial Report indicated that the rail industry has been able to regain its ability to raise prices on their non-captive customers, quoting one industry analyst as referring to this change as the industry's "pricing renaissance." Senate Financial Report, p. 8.

Beyond these generalized indications of less effective competition from other modes, there appear to be specific factors at work in the motor carrier industry. The Senate Financial Report quotes Wolfe Research, who predicts that railroads will "likely continue to take market share from the less fuel-efficient and increasingly less productive truck industry." Senate Financial Report, p. 4. There is good reason to believe that truck competition with rail carriers is less effective than it was twenty or even ten years ago.

For example, on December 23, 2010, the United States Department of Transportation released a notice of proposed rulemaking in RIN 2126-AB26, "Hours of Service of Drivers." This proposed rule would make significant amendments to the regulations for hours of service (HOS) for drivers of property-carrying motor vehicles. The American Trucking Associations have indicated that the proposed new rule is likely to "substantially reduce trucking's

[10] Wolfe/Trahan, "Inside Freight," October 4, 2010.

productivity."[11] ATA has claimed that the Federal Motor Carrier Safety Administration has indicated that the proposal would cost the industry about $1 billion per year, and ATA itself believes that the total effect will be substantially greater.[12] ATA also believes that, in addition to the motor carrier industry's increased cost, the proposal would also adversely affect service capabilities and the ability to meet delivery windows, thus impacting shippers' operations as well.[13]

But these new HOS rules are only the latest development in a string of changes that have adversely impacted the motor carrier industry. Other factors adversely affecting motor carrier costs and competitiveness include a long-term driver shortage,[14] increased safety enforcement flowing from DOT's new CSA 2010 safety reporting program on the industry,[15] and increased costs due to higher fuel prices. With respect to the competitive effect of the last factor, the AAR itself has noted that rail carriers are four time more fuel-efficient than trucks.[16] In view of all of these developments, the Board cannot simply assume that competition from motor carriers is as vigorous as it was when the Board entered its exemption decisions, and a review is clearly indicated.

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[11] See, http://www.truckline.com/pages/article.aspx?id=828%2F{8E1C7279-ED27-4C03-B189-CEEEE26BBB12}
[12] See, http://www.safedriverhours.com/Shipper%20Receiver%20White%20Paper.pdf.
[13] *Id.*
[14] See, "The U.S. Truck Driver Shortage: Analysis and Forecasts," report prepared by Global Insight, May 2005.
[15] For an analysis of the new CSA 2010 program on the industry, see Annette Sandberg, "CSA 2010 and What It Means For Commercial Motor Carriers," Journal of Transportation Law, Logistics and Policy, Vol. 77 No. 4 (2010), p. 257. Industry analysts have indicated that CSA 2010 may reduce the available number of drivers, thus exacerbating the driver shortage. See, *e.g.*, Wolfe/Trahan, "Comprehensive Safety Analysis (CSA 2010) – A Deeper Look," May 24, 2010; *Transport Topics*, "Special Report: CSA 2010," April 2010, p. A-16-18. One industry analyst indicated that the new HOS regulations, along with the CSA 2010 program and other government regulations, could cause about 300,000 drivers to be eliminated in the industry. Dahlman Rose & Co., "2011 Road and Rail Outlook," January 18, 2011, pp. 4-5.
[16] http://www.aar.org/~/media/aar/backgroundpapers/freightrailroadsofferasmarteffectivewaytoreducegreenhousegasemissions.ashx

IV. THE BOARD SHOULD UNDERTAKE A REVIEW OF ITS COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS, AND SHOULD COMMIT TO PERIODIC REVIEWS IN THE FUTURE

In view of the fact, as the Board stated in its Notice, as many as thirty years have passed since the granting of these exemptions; that there have been significant statutory changes that have undermined the stated rationale for many of these exemptions; and that there have been major changes in the rail marketplace, the Board cannot simply presume that the conditions originally supporting the grant of these exemptions still exist. At this stage, the Board does not need to determine that these exemptions should be changed. The Board *should* determine, however, to look at these matters in one or more formal proceedings.

In addition, the Board should commit to a periodic review of its exemptions. The League suggests that the Board review its exemptions at least once every five years.

The League appreciates the opportunity to make its views known on this matter.

Respectfully submitted,

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Dated: January 31, 2011